

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.568 of 2018

Judgment Reserved on : 18.11.2019

Judgment Delivered on : 17.1.2020

1. Videshiram Dhruv, son of Late Jagatram Dhruv, aged about 50 years, resident of Village Soram, Post Office and Police Station Rudri, District Dhamtari, Chhattisgarh
2. Prakash Mishra @ Raju, son of Bharat Lal Mishra, aged about 40 years, resident of Near Aama Talab, Post Office and Police Station Dhamtari, District Dhamtari, Chhattisgarh

---- Appellants

versus

State of Chhattisgarh through the District Magistrate, Dhamtari, District Dhamtari, Chhattisgarh

--- Respondent

For Appellants : Shri Sunil Sahu, Advocate
For Respondent : Shri Anand Verma, Dy. Government Advocate

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 31.3.2018 passed by the Additional Sessions Judge (FTC), Dhamtari in Sessions Trial No.56 of 2017, whereby each of the Appellants has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 7 years and fine of Rs.1,000/- with default stipulation
Under Section 420/34 of the Indian Penal Code	Rigorous Imprisonment for 2 years
Under Section 354 of the Indian Penal Code	Rigorous Imprisonment for 1 year and fine of Rs.500/- with default stipulation

Under Section 354B of the Indian Penal Code	Rigorous Imprisonment for 1 year and fine of Rs.500/- with default stipulation
Under Section 6 of the Chhattisgarh Tonahi Pratadna Nivaran Act (henceforth 'the Nivaran Act')	Rigorous Imprisonment for 1 year and fine of Rs.500/- with default stipulation
Under Section 7 of the Nivaran Act	Rigorous Imprisonment for 6 months

2. Prosecution case, in brief, is that on the relevant date, the prosecutrix (PW12) was a 22 years old unmarried girl. Complainant Hareram (PW13) is her brother. On 26.8.2017, he made a written complaint (Ex.P16) alleging that in the first week of November, 2016 both the Appellants scared him that the prosecutrix is under witchcraft which according to them was required to be healed by *jhadphoonk* and *tantra-mantra* and this way they obtained a sum of Rs.2,00,000/- from him. When the health of the prosecutrix did not recover, he demanded his money back from the Appellants, but they did not refund his money. It is further alleged that the prosecutrix had also told him that Appellant Prakash had teased her in the treatment room while doing *jhaadphoonk* on her and he, saying that God was to be served with *bhog*, had inserted and shaken his finger in her private part and he had also scared her saying that on telling about this to anyone, she and her family members would die one by one. It is further alleged that Appellant Videshram also helped Appellant Praksh in his wrong acts. On the basis of the said complaint, offence was registered. Statements of the Complainant, the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. The prosecutrix was medically examined by Dr. Asha Tripathi (PW10). Her report is Ex.P6. On completion of

the investigation, a charge-sheet was filed against the Appellants. Charges were framed against them.

3. In support of its case, the prosecution examined as many as 13 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellants denied the guilt and pleaded innocence. No witness has been examined in defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellants as mentioned in the first paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellants submitted that without there being any clinching evidence on record against the Appellants, the Trial Court has wrongly convicted them. It was further submitted that the alleged incident took place in November, 2016, but the FIR was lodged after 11 months of the alleged incident and that too by the brother of the prosecutrix. The prosecutrix herself has not made any complaint. The entire story narrated by the prosecutrix and her brother is false and fabricated. There was some dispute regarding transaction of money between Appellant Prakash and brother of the prosecutrix Hareram (PW13) and to create pressure on Appellant Prakash, the FIR was lodged by Hareram (PW13). There are material contradictions and omissions in the statements of the witnesses. They have also developed their statements on material points. Therefore, their statements are not reliable.
6. Learned Counsel appearing for the State/Respondent supported the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and

perused the record with due care.

8. Ramesh (PW1), Liladhar (PW7) and Jitendra (PW9) have not supported the case of the prosecution and turned hostile. Patwari Pradeep Kumar Sahu (PW2) prepared the spot-map (Ex.P2). Lady Constable Keshar Mandavi (PW3) took the prosecutrix to the doctor for medical examination. Assistant Sub-Inspector C.L. Sahu (PW4) is the witness who recorded the FIR (Ex.P4) on the basis of the written complaint made by Hareram (PW13). Deputy Superintendent of Police P.S. Mahilane (PW8) investigated into the offence in question. Dr. Asha Tripathi (PW10) examined the prosecutrix on 28.8.2017. Her report is Ex.P6. According to this witness, she did not find any injury over the body of the prosecutrix. She found that the hymen of the prosecutrix was intact and there was no swelling in her private part. This witness has opined that she was not able to give any definite opinion whether any finger was inserted in the private part of the prosecutrix or not. According to this witness, since hymen of the prosecutrix was not torn, only fingertip could be inserted in her private part.
9. The prosecutrix (PW12), in her Court statement, has deposed that on 13.10.2016, she had fallen ill and, therefore, she was taken to Bathena Hospital for treatment. There, her uncle Appellant Videshiram met with them. He told that he knew Appellant Prakash who does *jhaadphoonk* and by his treatment she would be healed. On this, along with Appellant Videshiram, she, her brother and mother went to the house of Appellant Prakash. Appellant Prakash told that she would be required to come to him daily for *jhaadphoonk*. On this, they told that their house was situated far

away and, therefore, it would be difficult for her to come to his house daily. On this, Appellant Videshiram told that she could stay at his house and from there she could go to the house of Appellant Prakash for treatment. She stayed at the house of Appellant Videshiram. Her mother also stayed there with her for few days. Thereafter, Appellant Videshiram used to take her on his motorcycle from his house to the house of Appellant Prakash. She has further deposed that during the treatment, Appellant Prakash used to stroke her breasts and also used to insert his finger in her private part. He used to say that the God was to be served with *bhog*. She has further deposed that after getting her naked he used to insert his finger in her private part frequently. She has further deposed that he used to tell her brother Hareram (PW13) that much time is not left with them and, therefore, they should deposit a sum of Rs.2,00,000/- with him early. Her brother Hareram (PW13) gave the sum of Rs.2,00,000/- to Appellant Prakash. Regarding Appellant Videshiram, she has deposed that whenever she told Appellant Videshiram about the wrong acts of Appellant Prakash, Appellant Videshiram told her that Appellant Prakash is his *guru* (teacher) and whatever was being asked by Appellant Prakash to do, she should do so.

10. Radhikabai (PW11) is mother of the prosecutrix. She has supported the statement of the prosecutrix. She has also categorically stated that the prosecutrix was taken to Bathena Hospital where Appellant Videshiram met with them. He told them that Appellant Prakash is a *Tantrik*, who does *jhaadphoonk*. According to this witness, the prosecutrix was thereafter taken to Appellant Prakash, who asked to leave the prosecutrix with Appellant Videshiram. She has further deposed that Appellant

Prakash used to call the prosecutrix at his house for doing *jhaadphoonk* on her. According to this witness, Appellant Videshiram used to take the prosecutrix to Appellant Prakash for *jhaadphoonk*. This witness has also stated that Appellant Prakash, telling that a sum of Rs.2,00,000/- would be required for treatment of the prosecutrix, had obtained that sum from her son Hareram (PW13). This witness has further deposed that later on the prosecutrix had told her that Appellant Prakash, while doing *jhaadphoonk* on her at his house, used to remove her clothes and insert his finger in her private part. The prosecutrix had also told her that when she told this fact to Appellant Videshiram, he told her that if she does as is asked by Appellant Prakash, her health will recover early.

11. Complainant Hareram (PW13), brother of the prosecutrix has supported the statement of the prosecutrix and has stated that the prosecutrix was ill and she was taken to Bathena Hospital where Appellant Videshiram met with them. He told them that Appellant Prakash is his *guru* (teacher) and is a *tantrik*. He further told that on getting treatment from Appellant Prakash, health of the prosecutrix will recover early. He has further deposed that he took the prosecutrix to the house of Appellant Prakash for her treatment. Appellant Prakash took the prosecutrix inside his room and examined her and after examination he told that there was a huge hurdle above the prosecutrix. He will deal with the sorcerer who had done witchcraft on her. On not getting the prosecutrix treated, she and each of her family members would die one by one. If they want to save the family, a sum of Rs.2,00,000/- would be required. He will eliminate the problem. He called him with money in Village Sankra after a week. On this, this witness

arranged a sum of Rs.1,50,000/- at his own from his house and borrowed a sum of Rs.50,000/- from Madanlal Jain (PW5) and thereafter he went to Village Sankra and gave the total sum of Rs.2.00,000/- to the Appellants in Village Sankra in presence of Jitendra Sahu and Dhanuj Jain. This witness has further deposed that on being asked by Appellant Prakash, he left the prosecutrix at the house of Appellant Videshram. On 28.1.2017, he went to bring the prosecutrix back, but he found that the prosecutrix had not recovered and, therefore, he demanded his money back from the Appellants. They refused to refund his money. He has further deposed that thereafter he took the prosecutrix back to home. At home, she told him that Appellant Videshram used to take her to Appellant Prakash for treatment. On the pretext of treatment, Appellant Prakash used to remove her clothes and insert his finger in her private part. When she told about this fact to Appellant Videshram, he told her that her health will recover only when she does as was being asked by Appellant Prakash. Thereafter, this witness made the written report (Ex.P16).

- 12.** Madanlal Jain (PW5) has supported the statement of Hareram (PW13) and has stated that in November, 2016, Hareram (PW13) had obtained a sum of Rs.50,000/- from him for the purpose of treatment of his sister (the prosecutrix).
- 13.** The prosecutrix (PW12), her mother Radhikabai (PW11) and brother Hareram (PW13), in their cross-examination, have admitted the fact that Appellant Videshram is like brother of Radhikabai (PW11) and their families visit to each other and, therefore, the prosecutrix was left at the house of Appellant Videshram for the purpose of said treatment. These 3 witnesses

have also admitted the fact that at the house of Appellant Prakash, along with him, his wife, his 3 children and his 1 sister were also residing. Radhikabai (PW11) has also stated that Appellant Prakash used to call the prosecutrix at his house for treatment within every 8-10 days and she was taking the prosecutrix to his house and she and the prosecutrix had stayed at the house of Appellant Videshiram. But, according to this witness, the prosecutrix never made her any complaint regarding the alleged wrong acts done by Appellant Prakash. Radhikabai (PW11) has also admitted that the prosecutrix was also having a mobile phone with her and was talking with her from that mobile phone, but she never made her any complaint against the alleged wrong acts. This witness has categorically admitted that when the Appellants did not refund the sum of Rs.2,00,000/- then only her son Hareram (PW13) made the report in the police station and earlier also Hareram had made a complaint in this regard in Sehava Police Station. The prosecutrix (PW12) has also admitted the fact that during the period of her treatment, she used to return from the house of Appellant Prakash to the house of Appellant Videshiram. Thereafter, while staying at the house of Appellant Videshiram, she also used to go out of his house for attending the call of nature and thereafter she again used to go to the house of Appellant Prakash where his family members were also residing. But, the prosecutrix never made any complaint to anyone against the alleged wrong acts done by Appellant Prakash. The prosecutrix has further admitted that if the sum of Rs.2,00,000/- had been refunded by the Appellants, her brother Hareram (PW13) would not have made any complaint. She has further admitted that since their money was not being refunded by the Appellants, her brother and *jija* consulted

with each other and for realisation of the money her brother Hareram (PW13) made the report. She has further admitted that her brother and *jija* had also consulted with an Advocate in this regard and she has also admitted that she is aware that on making a report of rape or outrage of modesty, money is given by the Government and she had also received a sum of Rs.3,00,000/- from the Government. Her brother Hareram (PW13) has also admitted that the prosecutrix had stayed at the house of Appellant Videshiram for about 3 months and during that period this witness had visited her there 10-15 times. This witness has further stated that he and the prosecutrix also used to talk with each other on phone during that period, but the prosecutrix never told him anything against any of the Appellants. This witness has also stated that he did not tell anything about the alleged incident to any person of the society nor was any social meeting called in this regard. This witness has also admitted that after making the report, the prosecutrix had received a sum of Rs.3,00,000/- from the Government.

14. On a minute examination of the evidence available on record, I find that the prosecutrix (PW12), her mother Radhikabai (PW11) and brother Hareram (PW13) have categorically stated that the prosecutrix used to remain ill. She was taken to Bathena Hospital at Dhamtari for treatment. There, Appellant Videshiram met with them. Videshiram, saying that Appellant Prakash is a *tantrik* and he does *jhaadphoonk*, took them to Prakash for treatment of the prosecutrix. Appellant Prakash also claimed himself to be a *tantrik* (sorcerer) and he, calling the prosecutrix at his house many times, also did *jhaadphoonk* on her. The above 3 witnesses have further categorically stated that during the period of said treatment, the

prosecutrix had stayed at the house of Appellant Videshram and Videshram used to take her to the house of Appellant Prakash for her treatment. All the above 3 witnesses have remained firm during their cross-examination. These 3 witnesses have further categorically stated that Appellant Prakash, saying that they did not have much time for treatment of the prosecutrix and if her treatment is not done on time she and her family members would die one by one, demanded a sum of Rs.2,00,000/- from them. According to these witnesses, at that time, Appellant Videshram was also present there. According to Hareram (PW13), he arranged a sum of Rs.1,50,000/- at his own from his house and obtained a sum of Rs.50,000/- from Madanlal Jain (PW5) and gave the total sum of Rs.2,00,000/- to Appellant Prakash in presence of Dhanuj Jain and Jitendra Sahu in Village Sankra. Though Dhanuj Jain and Jitendra Sahu have not been examined by the prosecution, Madanlal Jain (PW5) has supported the statement of Hareram (PW13) and has stated that he had given the sum of Rs.50,000/- to Hareram (PW13) for the purpose of treatment of the prosecutrix. On the point of giving of the sum of Rs.2,00,000/- by Hareram (PW13) to Appellant Prakash, Hareram (PW13), the prosecutrix (PW12), Radhikabai (PW11) and Madanlal Jain (PW5) have remained firm during their cross-examination. From the statements of the above witnesses, it is established that the Appellants scared the prosecutrix and her family members of their lives on not getting the prosecutrix treated and for her treatment by *jhaadphoonk* demanded the sum of Rs.2,00,000/- and also obtained this amount from Hareram (PW13). From the statements of the prosecutrix (PW12), Hareram (PW13) and Radhikabai (PW11), it is also established that before them Appellant Prakash

had claimed himself to be a *tantrik* and Appellant Videshiram had introduced before them Appellant Prakash as a *tantrik* and Appellant Prakash had also treated the prosecutrix by doing *jhaadphoonk* and *tantra-mantra* on her. Thus, the finding of the Trial Court in this regard is in accordance with the evidence available on record. Hence, I affirm the conviction of the Appellants under Section 420/34 of the Indian Penal Code and Sections 6 and 7 of the Nivaran Act.

15. With regard to the offence under Sections 376, 354 and 354B of the Indian Penal Code, though according to the prosecutrix, during her treatment, Appellant Prakash used to make her remove her clothes and he also used to insert and shake his finger in her private part and on her telling this fact to Appellant Videshiram he asked her to do whatever was being told to her by Appellant Prakash for the purpose of early recovery of her health, the statement of the prosecutrix in this regard is not reliable because she lived at the house of Appellant Videshiram for about 3 months and during that period she was treated by Appellant Prakash at his house and during that period itself her mother Radhikabai (PW11) and brother Hareram (PW13) used to visit and talk with her there in person and also on phone but she never made any of them any complaint about the incident. From the evidence on record, it is also clear that along with Appellants Videshiram and Prakash, their family members also used to live, but none of the prosecutrix (PW12), her mother Radhikabai (PW11) and brother Hareram (PW13) made any complaint to any of the family members of the Appellants regarding the incident. From the statement of Dr. Asha Tripathi (PW10) also, it is clear that hymen of the prosecutrix was found intact and it is also reported by the said doctor that only

finger-tip could be inserted in the private part of the prosecutrix. Therefore, the statement of the prosecutrix that Appellant Prakash used to insert and shake his finger in her private part is not acceptable. Thus, the offence under Sections 376, 354, 354B of the Indian Penal Code is not proved against the Appellants beyond reasonable doubt. Therefore, the Appellants are acquitted of the charges framed under Sections 376, 354, 354B of the Indian Penal Code.

16. So far as sentence of the Appellants against their conviction under Section 420/34 of the Indian Penal Code and Sections 6 and 7 of the Nivaran Act is concerned, they are reported to be in jail since 27.8.2017. Considering the facts and circumstances of the case, I am of the view that ends of justice would be served if they are sentenced with the period already undergone by them. Ordered accordingly. The sentence of fine imposed upon them for the offence under Section 6 of the Nivaran Act is affirmed.
17. Consequently, the appeal is allowed in part to the extent indicated above.
18. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
JUDGE